

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANTHONY J. ALANIZ
Claimant

VS.

ASSOCIATED WHOLESALE GROCERS
Respondent
Self-Insured

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Docket No. 202,211

ORDER

Claimant and respondent requested review by the Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on November 26, 1996.

APPEARANCES

Claimant appeared by his attorney, Jonathan A. Bortnick of Kansas City, Missouri. Respondent, a qualified self-insured, appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Award.

ISSUES

Both claimant and the respondent question whether the Administrative Law Judge awarded the proper number of weeks of temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

The respondent voluntarily paid weekly temporary total disability benefits for 47.57 weeks for a total of \$15,167.36. The Administrative Law Judge found claimant was released to return to work on November 17, 1995, by Terrence Pratt, M.D., one of claimant's authorized treating physicians. However, claimant did not return to work until February 20, 1996, and respondent continued to pay temporary total disability benefits during that period of time. The Administrative Law Judge awarded claimant 34.43 weeks of temporary total disability benefits at the rate of \$319 per week or \$10,983.17 followed by 19.78 weeks of permanent partial disability compensation at \$319 per week or \$6,309.82 for a 5 percent permanent partial general disability for a total award of \$17,292.99 less amounts previously paid. Therefore, the Administrative Law Judge credited the total award with an overpayment of temporary total disability benefits in the sum of \$4,184.19.

Claimant injured his low back while working for the respondent on March 22, 1995. Respondent voluntarily provided medical treatment for claimant's low back injury through a number of physicians. However, Terrence Pratt, M.D., a board-certified physiatrist located in Kansas City, Missouri, was claimant's primary treating physician. Dr. Pratt provided conservative medical treatment in the form of physical therapy and pain medication from June 28, 1995 through November 17, 1995. At the respondent's request, Dr. Pratt saw claimant for a final time on May 15, 1996, for the purpose of obtaining a permanent functional impairment rating.

Dr. Pratt released claimant to return to work on November 17, 1995, with restrictions of pushing and pulling a maximum of 100 pounds and lifting a maximum of 60 pounds. Dr. Pratt imposed those restrictions on the claimant for four hours per day for the first week, six hours per day for the second week, eight hours per day for the third week, and commencing fourth week he released claimant to work without restrictions. Dr. Pratt, explained in his deposition during cross-examination that he imposed those particular restrictions to allow the claimant to have a functional restoration program over a few weeks period before claimant was returned to work without restrictions. Before Dr. Pratt examined the claimant on November 17, 1995, respondent supplied him with a video tape of the claimant washing his car at a car wash on or about October 17, 1995. After reviewing the video tape, the doctor testified he was of the opinion claimant was capable of working at that time. However, as previously indicated, Dr. Pratt, even after reviewing the video tape, prior to examining claimant on November 17, 1995, imposed restrictions on claimant's activities for three additional weeks.

Respondent contends Dr. Pratt's testimony proves claimant was capable of working at the time the video tape was taken until he returned to his regular job duties for the respondent on February 20, 1996. Claimant, on the other hand, argues that he was not able to work during that period of time. Claimant made an effort to admit additional

medical reports attached to his submission letter to the Administrative Law Judge which contained medical information that claimant received further medical treatment following his release from Dr. Pratt's care on November 17, 1995. The respondent timely objected to the admission of those medical records by a letter to the Administrative Law Judge, basing his objection on the fact claimant had not previously provided the records to the respondent and further respondent had not had an opportunity to cross-examine those health care providers. The Administrative Law Judge did not address the respondent's objection in his award. However, the Appeals Board finds respondent's objection should be sustained. The medical records attached to claimant's submission letter dated October 25, 1996, are inadmissible and thus not a part of the record considered in this matter. See K.S.A. 44-519.

The Appeals Board finds that the totality of the evidentiary record in this case establishes that the respondent overpaid claimant weekly temporary total disability benefits. The Appeals Board concludes there is no evidence contained in the record which proves it is more likely than not that claimant was completely and temporarily incapable of engaging in substantial and gainful employment from December 9, 1995 until he returned to work on February 20, 1996. See K.S.A. 44-510e(b)(2). Dr. Pratt released claimant to return to work with restrictions to be phased out over a period of three weeks on November 17, 1995. Claimant testified he did return to work on February 20, 1996, to his regular order filling job with the respondent. The Appeals Board finds claimant's work restrictions imposed by Dr. Pratt on November 17, 1995, rendered claimant temporarily and totally disabled until December 9, 1995. Thereafter, until claimant returned to work on February 20, 1996, there was no evidence in record that claimant was temporarily and totally disabled. Therefore, the Appeals Board concludes claimant was overpaid temporary total disability benefits for 10.57 weeks from December 9, 1995 through February 19, 1996. Furthermore, the Appeals Board concludes that K.S.A. 44-525(b) requires that the amount of the award due and unpaid at the time of the award shall be credited with the amounts of compensation before the date of the award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 26, 1996, is hereby modified and an Award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Anthony J. Alaniz, and against the respondent, Associated Wholesale Grocers, a qualified self-insured, for an accidental injury which occurred March 22, 1995.

Claimant is entitled to 37 weeks of temporary total disability at \$319 per week or \$11,803 followed 19.65 weeks of permanent partial compensation at \$319 per week or

\$6,268.35, for a 5% permanent partial general disability, making a total award of \$18,011.35 which is ordered paid in one lump sum less any amounts previously paid.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jonathan A. Bortnick, Kansas City, MO
Frederick J. Greenbaum, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director